Macharia v Kiruthi (Civil Appeal 023 of 2022)
[2024] KEHC 3685 (KLR) (2 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3685 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 023 OF 2022

SM MOHOCHI, J

APRIL 2, 2024

BETWEEN

FRANCIS MACHARIA ..... APPELLANT

AND

MARY KIRUTHI ..... RESPONDENT

(Appeals Partially (on the Issue of Loss of User, Value of The Vehicle and on Costs) from the Judgment of the Hon. Resident Magistrate (R. OMBATA) dated 1st February, 2022 in Nakuru Chief Magistrate's Court Civil Suit No. 1319 of 2018)

JUDGMENT

Background

1. The plaintiff now Appellant instituted the suit following an accident that occurred on the 7th of July, 2018 involving motor vehicles registration no KCE 386 V, Mazda Vanette Matatu belonging to the Appellant and KCJ 609 F, Toyota Isis belonging to the Respondent. Consequently, the plaintiffs' motor vehicle KCE 386 V Mazda Vanette Matatu was extensively damaged and was declared to be written off. The plaintiff moved Court for judgment as follows;

    a. Kshs 485,700/= being the value of the motor vehicle excluding salvage value, towing fees, assessment fees and search fees,

    b. Kshs 2,500/= per day from 7th July 2018 being loss of daily earnings per day when the motor vehicle shall be reinstated,

    c. Costs of the suit and interests on a, b and c.

2. The Court upon hearing the case rendered its judgment on the 1st of February, 2022 as follows

    i. Liability- defendant held to be 100% liable

ii. Quantum-

a. Value of motor vehicle- nil

b. Damages for loss of user- nil.

iii. Special damages- 34,450/=

iv. Each party to bear its own costs.

3. The Appellant Francis Macharia Ndirangu, being dissatisfied with the Judgment filed the Appeal on 21st of February 2022 Partially (on the Issue of Loss of User, Value of The Vehicle and on Costs) on the Judgment on the following eleven (11) grounds: -

i. That, the Learned Resident Magistrate erred in law in holding that the Appellant had only proved a sum of Kshs 34,400/= in special damages when the entire evidence which was tendered by the Appellant clearly supported all the claims set out in the Plaint dated 16th October 2018.

ii. That, the learned Resident Magistrate erred in law, in disregarding all the Appellant's evidence and in making a finding to the effect that the assessment report relied upon by the Appellant was not from an expert, all these notwithstanding the contents of the plaint and the tendered evidence.

iii. That, the learned trial magistrate erred in law and in fact, by not awarding damages for loss of user and appreciating the fact that the motor vehicle was a matatu and in fact finding the Respondent liable for the accident.

iv. That, the learned trial magistrate erred in law and in fact, by not properly analyzing and or considering the evidence by all parties, applicable legal principles, and other material on record while arriving at her decision finding that the Court would not rely on the bank statement and yet the appellant's evidence was that the account was used for the deposit of the income from the subject motor vehicle.

v. That, the learned magistrate erred in law and in fact, by holding that the loss of user and the claim for the salvage was not proved and even subjecting the Appellant's evidence not on the highest probability but beyond reasonable doubt yet this was a civil claim.

vi. That, the learned trial magistrate erred in law and in fact, by not taking into account the legal/factual effect of the Appellant's evidence, failing to properly evaluate and consider the pleadings, Appellant's submissions, and the applicable law and principles on the award of loss of user and also the value of the vehicle.

vii. That, the learned magistrate failing to consider that, where it is established that damage has been incurred for which a defendant should be held liable, the plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered.

viii. That, the learned Resident Magistrate read too much into the Respondent's submissions and as a result erred in law by ultimately making a finding that the Appellant had not proved his claim

ix. That, there was no legal basis laid by the Learned Resident Magistrate as would have entitled her to disallow the Appellant's claim.

x. That, the learned Resident Magistrate erred in law, in disregarding the fact, that the Appellant's evidence in support of his case remained uncontroverted and that the Respondent herein offered no evidence and did not avail their Advocates to test the Appellant's evidence.

xi. The Appellant prays that the Learned Resident Magistrate's Judgment delivered on 1st February, 2022 be set aside and that Judgment be entered for the Appellant as prayed for in the Plaint dated 16th October 2018, and the costs of this Appeal be borne by the Respondent.

4. The Appellant argued all grounds of Appeal jointly that, as a 1st Appellate Court, this Court has to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions, bearing in mind that the Court did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the Court in a first appeal such as this one was stated in Selle & Another- Vs- Associated Motor Boat Co. Ltd & Others (1968) in the following terms;

> "I accept counsel for the respondent's proposition that this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some pint to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

5. That, the Appellant was satisfied with the finding on liability as such the appeal is premised on the quantum payable only and that the issues to be addressed are therefore as follows;

1. What constitutes a material damage claim?

2. Loss of user/ business claim.

6. As to what constitutes material damage claim? and did an accident occur? the Appellant contends that, as per the police abstract Pexh-9, it is not in dispute that on the 7th of July, 2018, an accident involving motor vehicles KCE 386V, Mazda Vanette Matatu and KCJ 609 F. Toyota Accident occurred and as a result motor vehicle KCE 386V, Mazda Vanette Matatu was extensively damaged. The question of liability was resolved by the Trial Court with the Respondents being awarded 100% liability which the appellants are not appealing.

7. As for whether there any damage to property? the Appellant supplied an assessment report prepared by Automobile Association of Kenya (AA Kenya) and called on the assessor who examined the motor vehicle KCE 386V, Mazda Vanette Matatu to testify on his behalf and produce the assessment report.

8. That on the 27th day of August, 2019, the assessor namely Saleh Wamese testified that he works with AA Kenya and that he was the one who assessed the Appellants' motor vehicle KCE 386V and accordingly prepared a report. His assessment of the motor vehicle was that it was involved in an accident; the damage were extensive and as such was written-off. He further testified that upon examining the vehicle, he prepared the report Pexh 10(a) produced before the Court and affirmed that it was his signature on the report.

9. That at the hearing, the qualifications and credibility of the assessor was not put into question but only raised during submissions by the Respondent. The assessor stated he was a qualified motor vehicle

assessor. The Respondents herein did not file any contrary assessment report to counter Pexh 10 (a), that being the case, the Respondents were satisfied with the credentials of PW-3 as such the assessment report stands unchallenged and should have been considered as such by the Trial Court.

10. That, the Trial Court considered the Respondents submissions on the qualifications of the expert witnesses and failed to consider that at no point during the substantive hearing was his credibility and qualifications called into question, he introduced himself as an assessor and the same was not dispute.

11. The Appellant urges this Court to consider the Court of appeal decision in Nkuene Dairy Farmers Cooperative Society Itd & another -versus- Ngacha Ndeiya (2010) eKLR,

> " Motor vehicle parts are sold in shops. An assessor, we think would be in a position to know their cost. The prices may vary from one shop to another but the prices are nonetheless ascertainable even without purchasing the item and fixing it on the damaged vehicle. Motor vehicle parts are Common items and any price which the assessor might have given could be counter checked and either accepted or disproved. The appellants having not questioned those prices must be taken to have accepted the report as representing the correct market prices of the various parts which were shown on the Assessor's report. The experience of the Assessor was not challenged and we think Onyancha J. was right in describing him as an expert, and his report as being opinion evidence. The Court had the right to accept or reject his opinion if the circumstances so dictated. The respondent, to our mind, particularized his claim in the plaint and called acceptable evidence to prove the same and we have no basis for faulting both the trial and first appellate Courts in the concurrent decision they came to. Indeed the decision of David Bagine v. Martin Bundi Civil Appeal No. 283 of 1996 which Mr. Kaburu cited to us, does state that a motor vehicle Assessor's report would provide acceptable evidence to prove the value of material damage to a motor vehicle. This Court differently constituted there said, as is material, as follows:
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> "He said he had not at all repaired the vehicle as he could not afford it. This seems far-fetched. If he was earning as he said shs.5000/= to shs.9000/= a day he could easily have repaired the vehicle and put it back on the road. The best evidence in this respect could have been supplied by an automobile assessor."

12. Further in, Kimatu Mbuvi TIA Kimatu Mbuvi & Bros -vs_ Augustine Munyao Kioko, Civil Appeal No 203 of 2001(2007) the Court opined,

> " We find this latter submission by Mr. Masika rather disconcerting since the suggestion appears to be that doctors would consciously sacrifice their professional integrity and honour at the altar of monetary benefit! Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions. We have stated before, and it bears repeating, that such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified. But a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

13. The Appellant herein was required to show the extent of the damage on his motor vehicle and what it would cost to restore the motor vehicle to as near as possible the condition it was in before the damage complained of. The Appellant did so by way of an assessment report and called the assessor to testify on its strength, no contrary report was filed by the Respondents thus the report was unchallenged and uncontroverted, why then would the trial Court reject the findings of the report?

14. As to whether the Appellant entitled to any award for the damage occasioned? It is submitted that, the crux of a material damage claim is to reinstate the asset lost or damaged, in this instance motor vehicle KCE 386V, Mazda Vanette Matatu was damaged due to the negligent actions on the part of the Respondent, the damage was so extensive that the motor vehicle was written-off. Had it not been for the accident, the Appellant would have continued his matatu business to the best of his strength. The Appellant thus moved the Court for an award of Kshs 455,000/- being the value of the motor vehicle less the salvage value as per the assessment report. The principle of compensation calls on a negligent party, to pay a sum of money which will put the party who has suffered loss in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation.

15. In view of the above, The Appellant urges the Court to consider the assessment report and award the Appellant the value of the motor vehicle so as to at least reinstate him to his position before the accident

16. As to Loss of User of chattel, the Appellant submits that, he testified in the Trial Court to being the owner of motor vehicle registration no KCE 386 V, Mazda Vanette and produced a motor vehicle search Pexh 1 as proof. He testified that the motor vehicle before the accident was a matatu operating as such under the umbrella of Molo Group Shuttle and was used to ferry passengers between Naivasha and Nakuru.

17. The motor vehicle earned him an estimate of Kshs 2, 500/= after expenses were deducted as indicated by PW-2 who used to deposit the profits personally. The money was always deposited at Family Bank hence production of the bank statement (Pexh 5). The account was registered in the names of Mary Wambui who is the wife to the Appellant as per Pexh 6 and the account was solely for proceeds of the matatu business. The Appellant through Pexh 3 and 4 adduced evidence in support of the claim that the motor vehicle KCE 386 V was used for his matatu business and was trading under Molo Group Service.

18. That considering the nature of matatu business, daily earnings are hard to predict, there are daily expenses like fuel, cleaning, employee payments and other needs such as service.

19. That the Appellant settled on a figure of Kshs 2,500/= being an average of the proceeds less expenses, there is a possibility the proceeds on a daily and could be more or less. The average matatu fare from Nakuru to Naivasha is 250/= which means one trip earned the matatu Kshs 3,500/= on estimate. The claimants claim of daily earnings of Kshs 2,500/= is reasonable and substantiated.

20. That, borrowing from the words of the Court of Appeal in Samuel Kariuki Nyangoti- vs- Johaan Distelberger where the Appellant had claimed loss of user of his matatu which had been involved in an accident, the Court of Appeal opined as follows;

> " The damages claimed by the appellant were in the nature of pecuniary loss which the law does not presume to be the direct, natural or probable consequence of the accident since it is subject of ascertainment by Court through evidence and the Application of the law relating to the measure of damages. In personal injury cases, the loss of business profits and loss of future earning capacity are usually in the nature of general damages. The loss of use of a profit-making chattel such as a lorry or matatu through an accident is similarly a claim in general damages. The standard of proof in such claims is on balance of probabilities and the principle of restitutio in integrum is applied in such cases."

21. That in the case of Chinese Technical Team for Kenya National Sports Complex & 2 others vs Chabari M' Ingaruni (Civil Appeal No 293 of 1998), a claim for loss of use of a vehicle - a matatu, apparently

written-off in an accident, was allowed for a period of six months although no supporting documentary proof by way of books of accounts was produced upon the Court being satisfied that the vehicle was used as a means of earning income for the deceased plaintiff,

22. And in the case of Peter Njuguna Joseph & Another v Anna Moraa (Civil Appeal no 23 of 1991), this Court assessed the loss of user of an immobilized matatu by estimates of the net income and period under which it should have been repaired even though not a single document was produced.

23. And in the case of Jebrock Sugarcane Growers Co. Limited v. Jackson Chege Busi, Civil Appeal No. 10 of 1991 (Kisumu) (unreported) the Court in allowing a claim for general damages for loss of user of a lorry relied on p.226 para 394 of Halsbury's Laws of England Vol. 11 3rd Edition which stated thus:

> " The fact that damages are difficult to estimate and cannot be assessed with certainty or precision does not relieve the wrong doer of the necessity of paying damages for his breach of duty and is no ground for awarding only normal damages".
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> The authors continue to say in the same passage thus:
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> Where it is established, however, that damage has been incurred for which a defendant should be held Iiable, the plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered. Thus, the Court or a jury doing the best that can be done with insufficient material may have to form conclusions on matters on which there is no evidence and to make allowance for contingencies even to the extent of making a pure guess..."

24. Looking at a more recent case, Martin Gicimu Kamanga v Board of Governors, St Anne's Junior School, Lubao [2021] eKLR the Court in determining the place of loss of user in the Kenyan context opined as follows:

> " Did the appellant adduce adequate evidence to support assessment of his loss of user for quantification by the Court? He said the vehicle was a matatu, and, therefore, a commercial vehicle. He stated that he earned an average of Kshs. 5,000/- per day from it, and on a good day Kshs. 10,000/-, and that he lost that amount of money when the vehicle stopped operating for the twenty-eight days after the accident. His driver and witness said that in a day they could make Kshs. 7, 000/-
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> They both confirmed that they did not keep records of how much money the vehicle brought in. The defence did not offer any evidence, and the testimonies of the appellant and his driver went uncontested and uncontroverted. In my view, the appellant tendered adequate evidence to support his contention that he lost business when his matatu was off-road for twenty-eight days. Courts in such cases as Jackson Mwabili vs. Peterson Mateli (2020] eKLR (Mwita J), Peter Njuguna Joseph & another vs. Anna Moraa CA No. 23 of 1991 (unreported) and Samuel Kariuki Nyangoti vs. Johaan Distelberger [2017] eKLR (Githinji. Karanja & Kantai JJA), have awarded claims for loss of user without any supporting documentary proof by way of books of accounts on loss of income, or on what the vehicle was making prior to the accident. In most of these cases, the Courts allowed the claims for a period of up to six months. The claim by the appellant herein is for twenty-eight days. Going by the authorities above, I am satisfied that the Appellant proved loss of user. He put his loss at Kshs. 5, 000/-.There was evidence that the matatu could earn the appellant Kshs. 7,000/- and even Kshs. 10, 000/- per day, but the appellant opted for a more

conservative figure. The sum claimed of Kshs. 140, 000.00 should have been awarded to him"

25. The Appellant produced a certified copy of Family Bank statements for the period 1st of May, 2018 to 15th July, 2018. PW 1 and PW 2 (pages 125 and 126) testified that all profits/earnings were deposited into that account after all expenses were deducted. The account was registered in the names of Mary Wambui Maina who is the wife to the Appellant and a marriage certificate attesting to that was produced. From the records produced deposits ranging from Kshs 500- Kshs 10,000/= would be deposited into the account regularly on diverse dates.

26. That PW2 corroborated this by stating that earnings from a day would vary with a minimum of Kshs 2,500/= once all expenses were deducted and also taking into account that a matatu would not necessarily been in operation every single day. Further that he was the one depositing the monies into the Bank Account No. 0180xxxxxx registered to Mary Wambui Maina.

27. That, the records provided by the Appellant were sufficient proof of the fact that he earned money from the matatu business, it is not the Appellants fault that he did not have a more sophisticated business model to track his earnings from Motor vehicle KCE 386 V Mazda Vanette, more so the Appellant could not have premeditated the occurrence of such an accident to plan or keep better records. To punish the Appellant any further yet he has already suffered immense losses from the accident would be unjust.

28. The Appellant would like to draw the Courts attention to the decision by Apaloo in Wambua-vs-Patel (1986) KLR336 where the Court had found the plaintiff had not kept proper records of what he earned but stated;

> " Nevertheless, I am satisfied that he was in the cattle trade and earned his livelihood from that business. A wrong doer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business method"
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> "But a victim does not lose his remedy in damages because the quantification is difficult."

29. That, the motor vehicle KCE 386 V Mazda Vanette was involved in an accident and as a result was extensively damaged. The Respondent was held to 100 % liable for the accident that occasioned the damage; the question of liability is not in contention at this instant.

30. That, the motor vehicle KCE 386 V Mazda Vanette was operating as a matatu and used to earn money from it, money which PW-1 and PW-2 have estimated to be Kshs 2,500/= on average and produced bank statements as proof. The records provided by the appellant were cogent, why then should the appellant be denied the prayers sought yet he is just a victim of the Respondents' negligence?

31. The Appellant therefore urges this Court to be persuaded by the reasoning of the Court in Martin Gicimu Kamanga v Board of Governors, St Anne's Junior School, Lubao [2021] eKLR and the authorities mentioned above and attached herein and find merit in our appeal.

32. The Respondent elected not to defend the Appeal or file written submissions as directed.

Determination

33. Having considered the Appeal and Appellant's written submission's the Court is of the view that the two issues for the consideration by this Court is; Firstly, if the Trial Court misdirected itself in failing to

find that, motor vehicle KCE 386 V Mazda Vanette Matatu was extensively damaged and was declared to be written-off and secondly if the Appellant is entitled to an award under the head of "loss of user"?

34. The law regarding special damages is that, they must be specifically pleaded and strictly proved by way of evidence. In the case of David Bagaine V Martin Bundi [1997] eKLR, the Court of Appeal while addressing the issue of loss of user stated as follows:

> " We must and ought to make it clear that damages claimed under the title "loss of user" can only be special damages. That loss is what the claimant suffers specifically. It cannot in the circumstances be equated to general damages to be assessed in the standard phrase "doing the best I can." The damages as pointed out earlier by us must be strictly proved. Having so erred, the learned Judge proceeded to assess the same for a period of nearly three years. There the learned judge seriously erred. Damages for loss of user of a chattel can be limited (if proved) to a reasonable period which period in this instance could only have been the period during which the respondent's lorry could have been repaired plus some period that may have been required to assess the repair costs (emphasis added).

35. In Linus Fredrick Msaky v Lazaro Thuram Richoro & Another [2016] eKLR, it was held thus: -

> " Starting with loss of user, of kshs. 25,000 it is important to note that the claim was a special damage which must not only be specifically pleaded, but it must be strictly proved by evidence. In this case, the appellant conceded in his evidence that he had no evidence of loss of user and that being the case, I need not delve further other than to find that there was no proof of loss of user hence the claim could not have been awarded as pleaded. See Douglas Odhiambo Apel & another vs Telkom (K) Ltd, CA 115/2006; Patlife V Evans [1892] 2 QB S 24; Kampala City Council vs Nakaya [1972] EA 446 & Hahn V Singh [1985] KLR 716."

36. From the foregoing in the absence of any evidence of the costs incurred by the plaintiff in hiring another motor vehicle, the prayer for loss of user fails. Secondly, where a vehicle has been declared to be a write-off, a claim for loss of user ought not to be entertained since an insured is supposed to be returned to the position he was in, before the accident. Therefore, granting a prayer for loss of user would amount double compensation.

37. In Permuga Auto Spares & another vs Margaret Korir Tagi [2015] eKLR, the Court stated thus: -

> " It is the Court's view that once a vehicle has been written off, the only compensation is the per-accident value, less salvage value as assessed and other reasonable consequential expenses that are subject to prove. There would ordinarily be assessment charges, towing charges, excess but not loss of user. The payment of the pre-accident value is made to bring the owner to as near as possible to the state he would have been if not for the accident and loss. In the Court's view, to award damages for loss of user as well as the pre-accident value and other consequential losses would be to award double compensation. The claim for loss of user is disallowed."

38. Section 48 of the *Evidence Act*, Cap 80 under which opinion of experts is catered for contemplates that the expert must testify; that section provides as follows:

> 48. Opinions of experts
>
> (1) When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of

handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.

(2) Such persons are called experts.

39. The application of this provision of the law was explained by the Court of Appeal in Mutonyi Vs Republic (1982) KLR 203 at 210 where Potter JA observed:

> " Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.
>
> Section 48 of the *Evidence Act* (Cap 80) provides that where, inter alia, the Court has to form an opinion upon a point "of science, art, or as to identity or genuineness of handwriting or finger or other impressions", opinions on that point are admissible if made by persons "specialist skilled" in such matters.
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> In Cross on Evidence 5th edition at page 446, the following passage from the judgement of President Cooper in Davie versus Edinburgh magistrates (1933) SC 34,40, as scenting the functions of expert witnesses:
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> "Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts put in evidence."
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> So, an expert witness who hopes to carry weight in a Court of law, must, before giving his expert opinion:
>
> 1. Establish by evidence that he is specially skilled in his science or art.
> 2. Instruct the Court in the criteria of his science or art, so that the Court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
> 3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness."

40. My analysis reveals that; Saleh Wamese testified that, he works with AA Kenya and that he assessed the Appellants' motor vehicle KCE 386V and accordingly prepared a report that was produced as PEXH 10 with a finding that the damage was so extensive that the motor vehicle was written-off, which evidence was clearly disregarded in err by the trial magistrate.

41. Having considered the facts of this case, the applicable law as well as the submissions made by the Appellant's Counsel on record, I hereby Set-aside the judgment dated 1st of February, 2022 and substitute thereof with the following orders: -

i. Liability- defendant held to be 100% liable.

ii. Quantum-

a. Value of motor vehicle- 485,700/=

b. Damages for loss of user- nil.

iii. Special damages- 34,450/=

iv. Each party to bear its own costs in the trial Court.

v. Interest at Court rates from the date of judgment in the subordinate Court.

vi. Costs of the Appeal shall be paid by the Respondent to the Appellant

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA TEAMS PLATFORM AT NAKURU ON THIS DAY OF 2ND DAY OF APRIL, 2024.

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S. MOHOCHI

JUDGE